U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 30Jul2002

Case No: 2001-BLA-0870

In the Matter of

ROBERT P. SMITH,
Claimant

v.

BILLY RAY CAROL CONSTRUCTION, CO.,
Employer,

KENTUCKY COAL PRODUCERS' SELF INSURANCE FUND,
Carriers,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

Ron Carson, Benefits Counselor
For the claimant

Robert Buttermore, Esquire
For the employer/carrier

BEFORE: JOSEPH E. KANE
Administrative Law Judge

DECISION AND ORDER — DENYING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover

benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2001).

On June 7, 2001, this case was referred to the Office of Administrative Law Judges for a formal hearing. (DX 32-33). Following proper notice to all parties, a hearing was held on January 28, 2002, in Harlan, Kentucky. The Director's exhibits were admitted into evidence pursuant to 20 C.F.R. § 725.456, and the parties had full opportunity to submit additional evidence and to present closing arguments or post-hearing briefs.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, statutes, and case law. They also are based upon my observation of the demeanor of the witnesses who testified at the hearing. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the quality standards of the regulations.

The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title. References to DX, CX, and EX refer to the exhibits of the Director, claimant, and employer, respectively. JX refers to the joint stipulation of medical evidence submitted by the parties. The transcript of the hearing is cited as "Tr." and by page number.

ISSUES

The following issues remain for resolution:

1. whether the miner has pneumoconiosis as defined by the Act and regulations;

2. whether the miner's pneumoconiosis arose out of coal mine employment;

3. whether the miner's disability is due to pneumoconiosis; and

4. whether the evidence establishes a material change in conditions within the meaning of Section 725.309(d).

The employer also contests other issues that are identified at line 18 on the list of issues. (DX 32). These issues are beyond the authority of an administrative law judge and are preserved for appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Factual Background and Procedural History

The claimant, Robert P. Smith, was born on September 10, 1927. (DX 1). Mr. Smith married Ms. Edna Williams in 1946, and they resided together until her untimely death in June 2001. (EX 1, p. 4-5). Currently, Claimant lives in Lowell, Kentucky. (Tr. 19). He has no children who were under eighteen or dependent upon him at the time this claim was filed. (DX 1; EX 1, p. 5).

Claimant began to notice his breathing problems in 1992. (Tr. 22). Since that time, the problem has increased. (Tr. 24-25). Walking any significant distance has become more difficult, and the claimant can no longer perform routine yard work. (Tr. 25-26).

Claimant testified to a smoking history spanning twenty years, ending in 1971. (Tr. 36). During that time, Claimant estimated that he smoked approximately one and one-half packs of cigarettes per day. (Tr. 37). However, estimates of Claimant's smoking vary greatly in the record. During a deposition, Claimant estimated that he smoked only fifteen years, (EX 1, p. 16), while various doctors' opinions report a twenty to thirty year smoking history.

Mr. Smith filed his instant application for black lung benefits on July 26, 1999. (DX 1). The Office of Workers' Compensation Programs denied the claim on December 3, 1999, and, after reviewing additional evidence, affirmed its denial on February 15, 2001. (DX 11-12). Pursuant to claimant's request for a formal hearing, (DX 14), the case was transferred to the Office of Administrative Law Judges for a formal hearing. (DX 32-33).

Claimant filed his original claim on September 18, 1992. (DX 31-438). On May 29, 1994, an administrative law judge granted the claimant benefits, finding that he suffered from pneumoconiosis and was totally disabled from the disease. (DX 31-31 through -36). Employer appealed the determination, (DX 31-28), and the Benefits Review Board [BRB] affirmed in part and vacated in part the administrative law judge's decision. (DX 31-6 through -8). Specifically,

the BRB vacated the administrative law judge's determination regarding the presence of pneumoconiosis in the claimant. The BRB did not disturb the administrative law judge's determination that the claimant was totally disabled. Upon remand, the administrative law judge concluded that the weight of the evidence did not demonstrate the presence of pneumoconiosis. (DX 31-1 through -3).

Coal Mine Employment

The duration of a claimant's coal mine employment is relevant to the applicability of vari-ous statutory and regulatory presumptions. At the hearing, the parties stipulated that Mr. Smith worked for thirty-two years in qualifying coal mine work. (Tr. 17; DX 31-32). Based upon my review of the record, I accept the stipulation as accurate and credit claimant

with thirty-two years of coal mine employment. During his coal mining career, Claimant worked for several companies and performed several jobs. Among his various jobs, Claimant worked as an auger operator, repairman, heavy equipment operator, cook, bottle washer, and a foreman. (EX 1, p. 5-10). Claimant worked approximately six years underground during his thirty-two years of coal mine employment. (EX 1, p. 8). While employed with Billy Ray Carroll Construction Company, Claimant worked as a coal auger operator. (DX 2). Claimant ran the auger and extracted the coal from outside the mineshaft. (Tr. 19-20). His job as an auger operator required no physical exertion. (Tr. 20). It required him to sit on the machine and operate the controls. *Id.* The job, however, was very dusty – requiring the claimant to wear goggles to properly operate the machine. *Id.* Claimant testified that he would return home from work covered in dust all the time, as all of his jobs were "dusty" jobs. (Tr. 20-21). Claimant surmised that the dustiest job he had was either auger operator or continuous miner. (Tr. 21).

Claimant testified that he quit because he "was getting too old." *Id.* During his deposition testimony, Claimant also stated that the closure of a mine precipitated his retirement. (EX 1, p. 10).

Responsible Operator

In order to be deemed the responsible operator for this claim, Billy Ray Carroll Construction Company must have been the last employer in the coal mining industry for which Claimant had his most recent period of coal mine employment of at least one year, including one day after December 31, 1969. 20 C.F.R. §§ 725.492(a), 493(a). The Social Security records and claimant's employment history forms establish that Billy Ray Carroll Construction Company was the last employer to meet these conditions. (DX 2-3). Accordingly, on July 11, 2002, I dismissed the named secondary responsible operator and found that Billy Ray Carroll Construction Company properly is designated as the responsible operator.

Medical Evidence

A. X-ray reports[1]

[1] A chest x-ray may indicate the presence or absence of pneumoconiosis as well as its etiology. It is not utilized to determine whether the miner is totally disabled, unless complicated

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 9	08/06/99	08/06/99	Baker/B[2]	1/0 pneumoconiosis.
DX 10	08/06/99	08/27/99	Sargent/B/BCR[3]	Negative.
JX 1	08/06/99	09/29/99	Barrett/B/BCR	Negative.
DX 13	08/06/99	02/10/00	Alexander/B	1/0 pneumoconiosis.
DX 29	08/06/99	01/19/01	Fino/B	Negative.
n/a	08/06/99	01/07/02	Wiot/B/BCR	Negative.
DX 29	04/27/00	01/11/01	Fino/B	Negative.

pneumoconiosis is indicated wherein the miner may be presumed to be totally disabled due to the disease.

[2] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology may be given greater evidentiary weight than an interpretation by any other reader. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. 20 C.F.R. § 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). The Benefits Review Board and the United States Court of Appeals for the Sixth Circuit have approved attributing more weight to interpretations of "B" readers because of their expertise in x-ray classification. *See Warmus v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 261 n.4 (6th Cir. 1988); *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773, 1-776 (1984). The Board has held that it is also proper to credit the interpretation of a dually qualified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718).

[3] "BCR" stands for Board-certified radiologist

Exhibit	Date of X-ray	Date of Reading	Physician/ Qualifications	Interpretation
DX 13	10/26/00	11/14/00	Alexander/B	1/0 pneumoconiosis, p/p
CX 3	04/10/01	06/24/01	Alexander/B	1/1 pneumoconiosis, p/s

B. Pulmonary Function Studies[4]

Exhibit/ Date	Physician	Age/ Height	FEV_1	FVC	MVV	FEV_1/ FVC	Tracings	Comments
DX 7 05/05/99	Craven	71 69’	1.43	2.04	37	0.70	Yes	Good effort and cooperation
DX 9 08/06/99	Baker	71 67.5’	1.40	2.65	36	0.53	Yes	Fair cooperation and good comprehension.
DX 8 09/20/99	Baker	72 67.5’	1.46	2.75	36	0.53	Yes	Good effort and good comprehension.
DX 29 01/19/00	Fino	72 67’	1.47 1.58*	2.32 2.38*	47 41*	0.63 0.66*	Yes	Moderate obstruction with no bronchodilator response.
DX 13 04/27/00	Craven	72 69’	1.52	2.49	36	0.61	Yes	Good effort and cooperation.
CX 1 04/10/01	Craven	73 69’	1.54	2.23	28		Yes	Good effort and cooperation

[4] The pulmonary function study, also referred to as a ventilatory study or spirometry, measures obstruction in the airways of the lungs. The greater the resistance to the flow of air, the more severe any lung impairment. A pulmonary function study does not indicate the existence of pneumoconiosis; rather, it is employed to measure the level of the miner’s disability. The regulations require that this study be conducted three times to assess whether the miner exerted optimal effort among trials, but the Board has held that a ventilatory study which is accompanied by only two trac- ings is in “substantial compliance” with the quality standards at § 718.204(c)(1). *Defore v. Alabama By-Products Corp.*, 12 B.L.R. 1-27 (1988). The values from the FEV1 as well as the MVV or
FVC must be in the record, and the highest values from the trials are used to determine the level of the miner's disability.

*denotes testing after administration of bronchodilator

Validation report: On August 21, 1999, Dr. N. K. Burki issued a validation opinion. (DX 7). Dr. Burki opined that the May 5, 1999 pulmonary function study was unacceptable because the tracings indicated a suboptimal effort.

Validation report: On October 7, 1999, Dr. Burki issued a validation opinion addressing the September 20, 1999 pulmonary function tests. (DX 8). The doctor opined that the tests were acceptable.

Validation report: On December 17, 2000, Dr. Burki issued a validation opinion addressing the April 27, 2000 pulmonary function tests. (DX 13). The doctor opined that the tests were acceptable.

C. Arterial Blood Gas Studies[5]

Exhibit	**Date**	**Physician**	**pCO_2**	**pO_2**	**Resting/ Exercise**	**Comments**
DX 9	08/06/99	Baker	40.4	86.3	Resting	Exercise portion of study medically contraindicated due to chest pain.
DX 29	01/19/00	Fino	35.4	79.1	Resting	

D. Narrative Medical Evidence

Dr. Elias A. Dalloul issued an opinion letter on July 20, 1999. (DX 7). The doctor stated that he had treated the claimant for two to three years, and he believed that Claimant suffered from pneumoconiosis caused by Claimant's years of exposure to "occupational coal dust." Dr. Dalloul also noted that the claimant suffered from hypertension and diabetes. He

[5]A blood gas study is designed to measure the ability of the lung to oxygenate blood. The initial indication of a miner's impairment will most likely manifest itself in the clogging of alveoli, as opposed to airway passages, thus rendering the blood gas study a valuable tool in the assessment
of disability.

noted Claimant's symptoms of dyspnea upon mild exertion. The doctor attributed the claimant's respiratory impairment to coal workers' pneumoconiosis because the claimant's pulmonary function tests demonstrated moderate obstructive and restrictive disease. Dr. Dalloul further commented that Claimant was totally disabled and unable to perform his normal coal mine employment.

On August 6, 1999, Dr. Glen R. Baker examined the claimant. (DX 9). Dr. Baker recorded a thirty-five year coal mine employment history as a coal operator and mechanic for the claimant. In addition, the doctor noted an approximately twenty-four year tobacco use history, with the claimant smoking, on average, one and one-half pack of cigarettes per day. During the examination, the claimant complained of daily cough with sputum production, wheezing, dyspnea upon walking 100 to 150 yards, chest pain, orthopnea, and ankle edema. The doctor submitted the claimant to a chest x-ray, pulmonary function study, and arterial blood gas. Dr. Baker diagnosed 1) coal workers' pneumoconiosis based upon Claimant's chest x-ray and duration of exposure to coal dust; 2) chronic bronchitis based upon Claimant's history of cough, sputum production, and wheezing; 3) chronic obstructive pulmonary disease based upon Claimant's pulmonary function test results; and 4) possible pulmonary asbestosis based upon Claimant's history and chest x-ray. The doctor opined that the etiology behind the claimant's pneumoconiosis was Claimant's coal dust exposure. Dr. Baker concluded that coal dust exposure and cigarette smoking caused Claimant's chronic bronchitis and chronic obstructive pulmonary disease. The doctor also opined that Claimant suffered from a moderate to severe pulmonary impairment due to cigarette smoking and coal dust exposure. Due to Claimant's poor pulmonary function test results, Dr. Baker concluded that Claimant lacked the respiratory capacity to perform the work of a coal miner or comparable work in a dust-free environment.

Dr. Gregory J. Fino, board-certified in internal medicine with a sub-specialty in pulmonary diseases, examined the claimant on January 19, 2000, and produced a written opinion on March 1, 2000. (DX 29). The doctor recorded a twenty-six year tobacco use history and a thirty-five year coal mine employment history. Dr. Fino noted that only six years of Claimant's coal mine employment was spent underground. The doctor also noted that Claimant's last coal mining job was a miner repairman position which did not involve heavy labor. The position required cutting and welding and lifting pieces of metal weighing around 100 pounds. During the examination, the claimant complained of a breathing problem characterized by shortness of breath that had lasted around ten years, chest pain, daily cough, and dyspnea upon climbing one flight of stairs or walking

briskly on level ground. In addition to his physical examination, Dr. Fino submitted the claimant to a chest x-ray, pulmonary function testing, and arterial blood gas. Dr. Fino also reviewed medical results and opinions from other physicians as part of his examination. After his examination and review of the objective medical evidence, the doctor diagnosed "[m]oderate obstructive lung disease consistent with smoking and asthma." Dr. Fino opined that there existed insufficient objective medical evidence to justify a diagnosis of simple coal

workers' pneumoconiosis. The doctor did conclude, however, that the claimant was disabled from returning to his last coal ming employment from a respiratory standpoint, but Dr. Fino stated that such impairment was based upon the claimant's smoking and asthma and not his coal dust exposure.

Dr. Fino also performed an independent medical review on January 11, 2001. (DX 30). The doctor's report covered a review of an April 27, 2000 pulmonary function test and an August 6, 1999 chest x-ray. Dr. Fino opined that the pulmonary function study was invalid as it underestimated the claimant's true pulmonary function. Regarding Claimant's chest x-ray, Dr. Fino stated, "There were no changes noted on the chest x-ray consistent with a coal mine dust associated occupational lung disease."

Dr. Thomas M. Jarboe, board-certified in internal medicine, issued an independent medical opinion on January 4, 2002. (EX 2). Dr. Jarboe reviewed copious medical records concerning the claimant, including chest x-ray films and interpretations, pulmonary function studies, physical exam reports, arterial blood gases, and physicians' narrative opinions. After his review, the doctor opined that there was insufficient evidence to justify a diagnosis of pneumoconiosis. Dr. Jarboe's conclusion was primarily based upon two negative, inconclusive x-ray interpretations. The doctor stated that the maladies demonstrated by the pulmonary function test results could be seen with dust-induced lung diseases; however, the doctor opined that the claimant's impairment was rooted in cigarette smoking and bronchial asthma, not coal dust. The doctor based that conclusion upon the specific configuration of Claimant's pulmonary function tests, citing that Claimant's total lung capacity was essentially on the lower limit of normal despite the reduced forced vital capacity [FVC] measurements. Dr. Jarboe stated that the pulmonary function test revealed that the claimant had no restriction or a minimal restriction. The doctor also stated that a reduced forced expiratory volume in one second [FEV1] disproportionate to overall lung volume is more commonly seen in cigarette smoking and asthma than in coal dust inhalation. Dr. Jarboe also maintained that the pulmonary function test results produced a disproportionately low FEV1 for the amount of dust the claimant was exposed to as a surface miner. The doctor commented, "For example, the average dust exposure of bulldozer operators was 0.5 mg. per cubic mm. Dust exposures of this level would not be anticipated to cause significant airflow obstruction and certainly not the degree of airflow obstruction seen in Mr. Smith." *Id.* Dr. Jarboe opined that the claimant was totally and permanently disabled from a respiratory standpoint, basing his conclusion on the claimant's pulmonary function test results. The doctor stated that the etiology of the impairment was cigarette
smoking and asthma, not dust inhalation. The newly-submitted evidence also contains Dr. Jarboe's deposition, taken on January 8, 2002. (EX 2). The doctor's deposition testimony echoes his written report.

DISCUSSION AND APPLICABLE LAW

Because Mr. Smith filed his application for benefits after March 31, 1980, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718. Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Refiled Claim

In cases where a claimant files more than one claim and a prior claim has been finally denied, later claims must be denied on the grounds of the prior denial unless the evidence demonstrates "a material change in condition." 20 C.F.R. § 725.309(d). The United States circuit courts of appeals have developed divergent standards to determine whether "a material change in conditions" has occurred. Because Claimant last worked as a coal miner in the state of Kentucky, the law as interpreted by the United States Court of Appeals for the Sixth Circuit applies to this claim. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

The Benefits Review Board set forth its definition of "material change of conditions" under 20 C.F.R. § 725.309(d) in *Allen v. Mead Corp.*, 22 B.L.R. 1-61 (2000). In *Allen*, the Board overruled its holding in *Shupink v. LTV Steel Co.*, 17 B.L.R. 1-24 (1992) and adopted the Director's position for establishing a material change in conditions under section 725.309, to wit: a claimant must establish, by a preponderance of the evidence developed subsequent to the denial of the prior claim, at least one of the elements of entitlement previously adjudicated against him. Moreover, the Board made clear that a "material change" may only be based upon an element which was previously denied. In *Caudill v. Arch of Kentucky, Inc.*, 22 B.L.R. 1-97 (2000) (en banc on recon.), the Board held that a "material change in conditions" cannot be established based upon an element of entitlement which was not specifically adjudicated against the claimant in prior litigation.

The Sixth Circuit has adopted the Director's position for establishing a material change in conditions. Under this approach, an administrative law judge must consider all of the new evidence, both favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement that previously was adjudicated against him. If a claimant establishes

the existence of one of these elements, he will have demonstrated a material change in condition as a matter of law. Then, the administrative law judge must consider whether all the evidence of record, including evidence submitted with the prior claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98 (6th Cir. 1994). *See Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 1363 (4th Cir. 1996). In addition, the court determined that the administrative law judge must examine the evidence underlying the prior denial to determine whether it "differ[s] qualitatively" from that which is newly

submitted." The court reasoned that such an approach "[a]ffords a miner a second chance to show entitlement to benefits provided his condition has worsened." The court wrote that "entitlement is not without limits, however; a miner whose condition has worsened since the filing of an initial claim may be eligible for benefits but after a year has passed since the denial of his claim, no miner is entitled to benefits simply because his claim should have been granted." *Id.* at 998.

Applying the *Ross* standard, I must review the evidence submitted subsequent to July 17, 1995, the date of the prior final denial, (DX 31-1) to determine whether claimant has proven at least one of the elements that was decided against him. The following elements were decided against Claimant in the prior denial: (1) the existence of pneumoconiosis; (2) pneumoconiosis arising from coal mine employment; and (3) total disability due to pneumoconiosis. As mentioned above, the previous administrative law judge found that the claimant was totally disabled, and the BRB did not disturb the judge's determination. If Mr. Smith establishes any of the elements previously adjudicated against him with new evidence, he will have demonstrated a material change in condition. Then, I must review the entire record to determine entitlement to benefits.

Pneumoconiosis and Causation

The new regulatory provisions at 20 C.F.R. § 718.201 contain a modified definition of "pneumoconiosis" and they provide the following:

> (a) For the purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis.
>
> > (1) Clinical Pneumoconiosis. 'Clinical pneumoconiosis' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
> >
> > (2) Legal Pneumoconiosis. 'Legal pneumoconiosis' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.
>
> (b) For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

> (c) For purposes of this definition, 'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.

20 C.F.R. § 718.201 (Dec. 20, 2000). Section 718.202(a) provides four methods for determining the existence of pneumoconiosis. Each shall be addressed in turn.

Under section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. As noted above, I may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Furthermore, because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. *Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc); *Casella v. Kaiser Steel Corp.*, 9 B.L.R. 1-131 (1986).

The record contains nine interpretations of four chest x-rays. Of these interpretations, five were negative for pneumoconiosis while four were positive.

The newly-submitted evidence in the instant case is exceedingly close. Were I to rely on numerical superiority alone, I would find that pneumoconiosis has not been demonstrated, as the negative interpretations hold a five to four majority to the positive readings. The Benefits Review Board, however, has held that an administrative law judge is not required to defer to the numerical superiority of x-ray evidence, *Wilt v. Wolverine Mining Co.*, 14 B.L.R. 1-70 (1990), although it is within his or her discretion to do so, *Edmiston v. F & R Coal Co.*, 14 B.L.R. 1-65 (1990). *See also Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993)(holding that "[a]dministrative factfinders simply cannot consider the quantity of evidence alone, without reference to a difference in the qualifications of the readers or without an examination of the party affiliation of the experts").

The August 6, 1999 x-ray has been interpreted six times. Four physicians rendered negative interpretations, while two physicians produced positive interpretations. All six physicians are "B" readers; however, only two doctors interpreting the August 6, 1999 x-ray – Drs. Sargent

and Barrett – are "dually qualified" physicians, i.e., physicians who are both "B" readers and board-certified radiologists. Both dually qualified physicians produced negative interpretations, and, because of their credentials, I accord their interpretations greater weight. Thus, I find, due to both numerical superiority and superior credentials, the August 6, 1999 x-ray is negative for pneumoconiosis.

Unlike the August 6, 1999 x-ray, the latter three x-ray's corresponding interpretations are not saddled with conflicting interpretations. Dr. Fino interpreted the April 27, 2000 x-ray

as negative for pneumoconiosis whereas Dr. Alexander interpreted the October 26, 2000, and April 10, 2001 x-rays as positive for pneumoconiosis. I accept each physicians' interpretation and accord it concomitant weight. Thus, to this point, I have found two x-rays – August 6, 1999, and April 27, 2000 – negative for pneumoconiosis and two x-rays – October 26, 2000, and April 10, 2001 – positive for pneumoconiosis. At this point in the analysis, the newly submitted evidence is in equipoise.

The sole remaining ground upon which to differentiate the interpretations comprising the newly submitted evidence is the chronological order in which the specific interpretations were produced. In *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (Oct. 29, 1999) (en banc on recon.), the Board held that it was proper for the administrative law judge to give greater weight to the more recent evidence of record as the Sixth Circuit, in which jurisdiction the case arose, has held that pneumoconiosis is a "progressive and degenerative disease." *See Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1993). The Board also cited to *Mullins Coal Co. of Virginia v. Director*, OWCP, 483 U.S. 135 (1987), *reh'g. denied*, 484 U.S. 1047 (1988) wherein the Supreme Court stated that pneumoconiosis is a "serious and progressive pulmonary condition."

The rule bolsters weight afforded more recent x-ray interpretations and discounts older interpretations when the latter x-ray evidence demonstrates a worsening condition. In those circumstances, the latter evidence provides a more accurate picture of the miner's health. *See Conn v. White Deer Coal Co.*, 862 F.2d 591 (6th Cir. 1988). The rule's rationale, however, is absent when the x-ray evidence does not demonstrate a worsening condition. Thus, in *Woodward*, the Sixth Circuit rejected wholesale application of the "later evidence" rule where the recent x-ray evidence was negative for the existence of pneumoconiosis, but prior evidence was positive for the disease. The court noted that, because "pneumoconiosis is a progressive and degenerative disease," the administrative law judge is required to specifically resolve the "disharmony in the x-ray evidence." On the other hand, where newer evidence demonstrates a worsening of the miner's condition consistent with the presence of pneumoconiosis, the "later evidence" rule may be applied. *Woodward*, 991 F.2d 314 (6th Cir. 1993).

Application of the "later evidence" rule is inapposite in the instant case as the newly submitted x-ray evidence does not demonstrate a worsening condition for the miner. Rather, the

x-ray evidence is an example of one physician producing consistent opinions. Specifically, invocation of the later evidence rule in the instant case would involve according greater probative value to the x-ray interpretations of Dr. Alexander. Dr. Alexander's first x-ray interpretation, concerning the October 26, 2000 x-ray film, involved an x-ray six months after

the last x-ray taken on April 27, 2000.[6] Ignoring, for now, the difficulties of applying the later evidence rule after only a six month time span, Dr. Alexander's interpretation of the October 26, 2000 x-ray does not demonstrate a worsening condition because his interpretation is merely maintaining a consistent interpretation with his previous interpretation of Claimant's August 6, 1999 x-ray which Dr. Alexander read as 1/0 positive for pneumoconiosis. As Dr. Alexander's October 26, 2000 x-ray interpretation does not demonstrate a worsening condition, it cannot be granted more probative weight under the later evidence rule. Simply put, the doctor's interpretation provides this Court with no better picture of Claimant's physical condition as the doctor's interpretation is no different than his previous interpretation, which I found to be outweighed by superiorly-qualified physicians.

The remaining question is whether Dr. Alexander's final x-ray interpretation – addressing Claimant's April 10, 2001 x-ray – should be accorded additional probative weight under the later evidence rule. Dr. Alexander's interpretation of Claimant's April 10, 2001 x-ray follows his previous interpretation of Claimant's October 26, 2000 x-ray. The two x-rays were, thus, taken five and one-half months apart. The Board has indicated that a seven month time period between x-ray studies is sufficient to apply the "later evidence" rule, but that five and one-half months is too short a time period. *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983).; *Stanley v. Director, OWCP*, 7 B.L.R. 1-386 (1984). Accordingly, I decline to accord Dr. Alexander's final x-ray interpretation additional weight under the later evidence rule.

After such analysis, I find that the newly submitted x-ray evidence is in equipoise, and, thus, Claimant has failed to demonstrate the presence of pneumoconiosis by a preponderance of the evidence. As it is Claimant's burden to demonstrate a material change in conditions by demonstrating an element of entitlement previously adjudicated against him, I find that Claimant has failed in that burden.

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy or autopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions

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[6] In weighing x-rays based upon the "later evidence" rule, it is the date of the study, and not the date of the interpretation, which is relevant. *Wheatley v. Peabody Coal Co.*, 6 B.L.R. 1-1214 (1984).

applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under section 718.202(a)(4), a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis. Although the x-ray evidence is negative for pneumoconiosis, a physician's reasoned opinion may support the presence of the disease if it is supported by adequate rationale besides a positive x-ray interpretation. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993); *Taylor v. Director, OWCP*, 1-22, 1-24 (1986). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions.

A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based the diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A report may be adequately documented if it is based on items such as a physical examination, symptoms and patient's history. *See Hoffman v. B & G Construction Co.*, 8 BLR 1-65 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984); *Buffalo v. Director*, OWCP, 6 BLR 1-1164, 1-1166 (1984); *Gomola v. Manor Mining and Contracting Corp.*, 2 BLR 1-130 (1979).

A "reasoned" opinion is one in which the underlying documentation and data are adequate to support the physician's conclusions. *See Fields, supra*. The determination that a medical opinion is "reasoned" and "documented" is for this Court to determine. *See Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989)(en banc). An unsupported medical conclusion is not a reasoned diagnosis. *Fuller v. Gibraltar Corp.*, 6 B.L.R. 1-1292 (1984). *See also Phillips v. Director, OWCP*, 768 F.2d 982 (8th Cir. 1985); *Smith v. Eastern Coal Co.*, 6 B.L.R. 1-1130 (1984); *Duke v. Director, OWCP*, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how underlying documentation supports his or her diagnosis); *Waxman v. Pittsburgh & Midway Coal Co.*, 4 B.L.R. 1-601 (1982).

Dr. Dalloul diagnosed pneumoconiosis "secondary to many years of exposure to occupational coal dust." (DX 7). Beyond dust exposure, the doctor's brief letter provides no other rationale for his diagnosis nor does it specifically reference objective medical test results. Accordingly, I grant it no weight as it is poorly documented, and, more importantly, based only upon the miner's history of coal dust exposure. Under section 718.202(a)(4), a positive diagnosis

of pneumoconiosis based upon coal dust exposure alone "should not count as a reasoned medical judgment." *Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000).

Like Dr. Dalloul's opinion, Dr. Baker's opinion provides that his diagnosis of pneumoconiosis is based upon Claimant's x-ray and history of coal dust exposure. As such rationale alone is inadequate under section 718.202(a)(4), I accord it no weight. *Cornett*, 227 F.3d at 569. Beyond his pneumoconiosis diagnosis, Dr. Baker also diagnosed chronic bronchitis and chronic obstructive pulmonary disease. Both fall within the regulatory definition of legal pneumoconiosis. *See* 20 C.F.R. § 718.201(a)(2)(Dec. 20, 2000); *Robinson v. Director, OWCP*, 3 B.L.R. 1-798.7 (1981); *Tokarcik v. Consolidation Coal Co.*, 6 B.L.R. 1-666 (1983); *Hughes v. Clinchfield Coal Co.*, 21 B.L.R. 1-134, 1-139 (1999). I find Dr. Baker's opinion well reasoned and well documented, and I accord it concomitant weight.

Drs. Fino and Jarboe opined that Claimant did not suffer from pneumoconiosis. I find both physicians' opinions to be well reasoned and well documented. Both opinions are thorough and reach specific, explicit conclusions. Specifically, both physicians explain, in detail, how the objective medical research supports their opinions that Claimant's pulmonary function test results demonstrate obstructive defects due to smoking and asthma and not coal dust exposure. Accordingly, I grant each probative weight on the issue of the presence of pneumoconiosis. Additionally, Dr. Fino's independent medical review and Dr. Jarboe's deposition bolster their opinions, and I find both well reasoned.

When I consider the narrative opinions in toto, I find the preponderance of the evidence establishes the absence of pneumoconiosis. The probative value of the opinions of Drs. Fino and Jarboe outweighs the probative value of Dr. Baker's opinion. Thus, the claimant has failed to demonstrate, by a preponderance of the evidence, the existence of pneumoconiosis under any
of the methods contained in section 718.202(a). As Claimant has failed to demonstrate pneumoconiosis, he has also failed to demonstrate a material change in conditions. In addition, as pneumoconiosis has not been established, any analysis of either the etiology of pneumoconiosis or the etiology of Claimant's total disability is mooted.

Conclusion

In sum, the evidence establishes neither the existence of pneumoconiosis nor, concomitantly, a material change in conditions. Accordingly, the claim of Robert P. Smith must be denied.

Attorney's Fee

The award of an attorney's fee is permitted only in cases in which the claimant is found to be entitled to benefits. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to claimant for legal services rendered in pursuit of the claim.

ORDER

The claim of Robert P. Smith for benefits under the Act is denied.

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JOSEPH E. KANE
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty days from the date of this decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. This decision shall be final thirty days after the filing of this decision with the district director unless appeal proceedings are instituted. 20 C.F.R. § 725.479. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.